A-643
No. 94-8262

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

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SUPREME COURT, U.S.

RESPONDENT'S BRIEF IN OPPOSITION AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

1. Whether a petition for writ of certiorari to the state's highest court on that court's denial of a successive state habeas application should be denied as an inappropriate attempt to avoid the abuse of the writ doctrine where the same claims could not be advanced in federal court due to the abuse of the writ doctrine.

2. (a) Whether this Court has jurisdiction to review a claim rejected in a state habeas corpus proceeding where the basis of the denial was an adequate and independent state law ground.

   (b) Whether the delay occasioned by the pursuit of appellate and collateral review of a conviction and sentence of death violates the Eighth Amendment proscription against cruel and unusual punishment.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] and files this Brief in Opposition and Opposition to Motion for Stay of Execution.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying Lackey's state application for a writ of habeas corpus is unpublished, but a copy is attached to the supplement to the petition as Appendix B. The trial court's findings and conclusions are attached to the supplement to the petition as Appendix A.

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[1] For clarity, Respondent will be referred to as "the state" and Petitioner Clarence Allen Lackey, as "Lackey."

JURISDICTION

Lackey seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Lackey bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The State has lawful custody of Lackey pursuant to a judgment and sentence of the 238th Judicial District Court of Midland County, Texas, Cause No. 18,075.

First Trial

On August 3, 1977, Lackey was charged by indictment with the capital offense of intentional murder of Toni Diane Kumpf during the course of a burglary or an aggravated sexual assault. Following a transfer of venue to Tom Green County and a jury trial to determine Lackey's competence to stand trial, Lackey was convicted of capital murder on February 18, 1978. The jury affirmatively answered the special punishment issues two days later, and the trial court subsequently imposed the sentence of death on March 30, 1978.

On April 17, 1982, the Texas Court of Criminal Appeals abated Lackey's appeal to allow a retrial of the competency issue. On May 18, 1982, a jury determined that Lackey was competent to stand trial. However, on September 17, 1982, the Court of Criminal Appeals reversed the conviction, because the trial court improperly excluded for cause a prospective juror. *Lackey v. State*, 638 S.W.2d 439 (Tex.Crim.App. 1982).

Second Trial

On remand, venue was transferred to Midland County, Texas, and Lackey was again tried before a jury upon a plea of not guilty. On April 15, 1983, the jury found Lackey guilty of capital murder. A separate punishment hearing ensued and, on April 16, 1983, the jury answered affirmatively the two special issues submitted pursuant to former Article 37.071(b) of the Texas Code of Criminal Procedure. In accordance with Texas law, the trial court sentenced Lackey to death by lethal injection on May 2, 1983.

Lackey directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 14, 1989. *Lackey v. State*, 816 S.W.2d 392 (Tex.Crim.App. 1989). Following the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court of Criminal Appeals granted Lackey's motion for rehearing. After supplemental briefing and argument, the Court of Criminal Appeals affirmed Lackey's sentence on May 29, 1991. *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1991). Lackey's second motion for rehearing was denied on September 25, 1991. Because Lackey did not seek certiorari review, his conviction became final on December 24, 1991, the date upon which the time for filing a petition for writ of certiorari expired. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986).

First State Habeas Action

No action was taken by Lackey until after the trial court, on April 17, 1992, conducted a hearing prior to setting an execution date. On April 28, 1992, the court entered an order scheduling Lackey's execution for July 17, 1992. On July 9, 1992, the court permitted Lackey to substitute counsel, and on July 13, 1992, substitute counsel requested that the execution date be modified so that counsel could investigate and present claims in a state habeas application. The trial court granted the motion the same day and rescheduled the execution date for October

17, 1992. On September 17, 1992, Lackey again requested that the execution date be modified, and the trial court again granted the request. Lackey's execution was then set for December 17, 1992. On December 3, 1992, the court held a hearing on four motions filed by Lackey: a motion for discovery, which was denied[2]; a motion for funds for experts, which was denied; a motion to transcribe Lackey's second competency hearing, which was granted; and a motion to modify the execution date for the third time, which was denied.

On December 11, 1992, less than six days prior to the scheduled execution (and only eight days since the trial court denied Lackey's third request for a modification of the execution date), Lackey filed a 122-page state habeas application, raising 22 separate claims for relief. At 9:00 a.m. on December 16, 1992, the trial court entered findings of fact and conclusions of law and recommended that relief be denied. The Court of Criminal Appeals of Texas adopted the trial court's findings and denied relief at approximately 2:30 p.m. on December 16, 1992. *Ex parte Lackey*, No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992).

First Federal Habeas Action

Lackey then filed a federal habeas petition and request for a stay of execution in the United States District Court for the Western District of Texas, Midland-Odessa Division. After the state announced that it did not oppose a stay, the district court granted the stay at 4:27 p.m. on December 16, 1992. The Director of the Texas Department of Criminal Justice, Institutional Division, responded on January 12, 1993. After conducting an evidentiary hearing and receiving post-hearing briefing, the district court denied federal habeas relief, but granted a certificate of probable cause to appeal.

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[2] Mike West, an assistant district attorney for Lubbock County, offered Lackey's habeas counsel the opportunity to review the prosecution's files.

Lackey appealed the district court's denial of habeas relief to the Fifth Circuit Court of Appeals. The Fifth Circuit initially set the case for oral argument, but after receiving supplemental briefing from both parties, issued its opinion affirming the district court's denial of habeas relief without argument. *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994). Lackey then filed a petition for writ of certiorari in this Court, which was denied on January 9, 1995. *Lackey v. Scott*, 115 S.Ct. 743 (1995).

Second State Habeas Action

On February 2, 1995, the trial court scheduled Lackey's execution for March 6, 1995. Lackey filed a state application for writ of habeas corpus on February 23, 1995. The trial court entered findings of fact and conclusions of law recommending denial of habeas relief on March 1, 1995. Based upon the findings of the trial court, the Texas Court of Criminal Appeals denied relief on the same day. *Ex parte Lackey*, No. 24,267-02 (Tex.Crim.App. March 1, 1995).

B. Statement of Facts

The opinion of the Court of Criminal Appeals of Texas (partly quoting from its summary of the evidence in its previous appellate review of the case) adequately summarizes the evidence introduced at Lackey's trial:

> Diane Kumph was abducted from her Lubbock apartment shortly before dawn on July 31, 1977. Later that day, her partially nude body was discovered beside a dirt road outside of Lubbock, near [Lackey's] house. It appeared Kumph had been raped. She had been severely beaten. Her neck, face, arms, chest, back and legs were covered with bruises. Her throat had been slashed. This caused her death.
>
> A policeman who responded to a neighbor's report testified that it appeared that the front door of Kumph's apartment had been

> kicked open. There were indications that a violent struggle had occurred in her apartment.
>
> A fingerprint expert testified that a latent fingerprint discovered on a cigarette package found in the victim's bed belonged to [Lackey]. The brand was the same brand as a pack found on [Lackey] at the time of the arrest. Blood found on [Lackey's] boots matched Kumph's blood type. Secretor analysis showed that the individual whose semen was found in Kumph was a secretor and had the same type O blood as did [Lackey]. An expert testified that hairs found on Kumph's body were similar to [Lackey's] and marks found on the door of Kumph's apartment were very similar to the heel print of [Lackey's] boot.
>
> A person living in the adjoining apartment testified that he was awakened in the early morning, went outside, and saw a man matching [Lackey's] physical description driving away in a white pickup. A woman was slumped over in the seat. The truck was missing a hubcap from the right rear wheel. [Lackey], at the time of the murder, had use of a white pickup that was missing a hubcap from the right rear wheel. [Lackey] was identified by an acquaintance as having been in this truck, driving in Lubbock at approximately 5:00 a.m. on the morning of Kumph's abduction.
>
> Another resident of the adjoining apartment testified that she was awakened that morning by loud banging, and screams of "help me" and "get off me" coming from Kumph's apartment.
>
> [Lackey's] roommate, Carrol Johnson, testified that she had been at work all night the night of the murder. When she returned home that morning, about 7:30 a.m., [Lackey] was not home, but there was fresh blood all about the

house. Shortly after her return, [Lackey] phoned Johnson and said he was doing some laundry at a laundromat. He arrived at the house a half hour later with a bedspread and sheets he had washed. He burned a throw rug. Later that day, as Johnson and [Lackey] were discussing radio reports of the murder of Kumph and the search for a suspect, [Lackey] admitted to Johnson: "Baby, I've got to tell you something--I'm the one they're looking for."

More incriminating evidence was seized in a search of [Lackey's] house and the white truck. Leaves found on Kumph's face were very similar to leaves found in the truck, according to expert testimony. Hair taken from the truck was very similar to Kumph's, according to the expert. Sweepings from [Lackey's] apartment revealed hair that was very similar to Kumph's, according to more expert testimony. Blood found throughout [Lackey's] home matched Kumph's blood type, including that found on a blood soaked mattress. Blood was also found on the porch and on the exterior of [Lackey's] house. That blood matched Kumph's type. Blood found on the pickup matched the deceased's type. *Lackey* [*v. State*], 638 S.W.2d at 439-40.

* * *

Both the State and [Lackey] introduced evidence at the penalty stage of the trial, though [Lackey] chose not to testify. The State proved that [Lackey] was first convicted of a felony on September 6, 1973, when he was convicted of burglary and placed on felony probation. The State also showed the jury that [Lackey] was convicted on January 9, 1975, of the felony offense of burglary with intent to commit rape from an incident at the habitation of Ms. Rita Featherston on June 7, 1974. His previous felony conviction was revoked on January 9, 1975, based upon the burglary with intent to commit rape charge.

[Lackey] was sentenced to two concurrent five year sentences to be served in the Texas Department of Corrections.

The State also relied on the facts of the crime itself. [Lackey] was a stranger to the victim, who he apparently chose at random when he kicked open the door to her apartment in the pre-dawn hours of July 31, 1977. The offense began there and continued across town in Lubbock to his residence where he ultimately killed the victim. In addition to the knife wound from ear to ear across her neck, the victim's body bore evidence of trauma from severe beatings. These facts reflect a crime that was not only senseless, but was also an incident of prolonged brutality and repeated violent acts.

After the commission of the instant offense, [Lackey] dumped the body of the victim on a farmer's property and made a hurried attempt to conceal the evidence of the offense, even going so far as to rush the clothes and sheets to the laundry to clean them of blood. This behavior indicates a lack of remorse by [Lackey] for his actions. It also shows an attempt to destroy evidence of his actions and to evade prosecution.

* * *

Annabelle Lackey, [Lackey's] mother, testified that [Lackey] was moved around to several cities as a child, that [Lackey] did poorly in school, that [Lackey's] father drank a lot, that his father and he "fussed a lot," and that his father "hit him some." She also testified that [Lackey] did not drink around her, and she did not think that [Lackey] had a drinking problem.

Betty Edge testified that she was with [Lackey] for several hours prior to the murder of Kumph. Edge testified that at the time of the murder, she had known [Lackey] for almost six months. On the night of July 30, 1977, Edge and friends were at a small club in

Lubbock. [Lackey] arrived around midnight, at which time Edge considered him intoxicated. [Lackey] drank beer at another table until the bar closed at 2 a.m. At that time Edge, [Lackey], and four other persons continued on to an after hours club, where [Lackey] drank at most one more beer. The group stayed there less than an hour. Edge and [Lackey] were invited to the mobile home of their friends. They were at the mobile home for almost an hour, when Edge left to take one of the group home, and [Lackey] left to check on a friend. They ran into each other again outside the after hours club, and returned to the mobile home. Sometime later, [Lackey] removed all of his clothing, and Edge removed most of hers. Edge refused to engage in sex, and [Lackey] told her she was "a lady." [Lackey] did not appear angry and left shortly after 5 a.m.

Edge testified that [Lackey] was still intoxicated around 4 a.m., but appeared to be "sobering up" even though he continued to drink from midnight till after 4 a.m. She testified that she could not tell how many drinks [Lackey] had consumed between midnight and 2 a.m., but that [Lackey] might have had one beer at the after hours bar, and possibly two or three beers after that. [Lackey] was intoxicated, but at all times coherent and conversational.

Dr. Herbert Modlin, a general psychiatrist, psychoanalyst, and board certified neurologist, testified that he had examined [Lackey] for two hours and had read [Lackey's] past medical, psychiatric and psychological reports, and educational records. Modlin testified that [Lackey] had been psychologically tested as an adult, and at ages 7, 11, and 14; that [Lackey's] school record in academics was extremely poor, but that he had good marks for citizenship and art; that [Lackey's] IQ was 75 at age 7, 80 at age 11, 67 at age 14, which was mental retardation, and as an adult was probably in the 70-80 range; and that [Lackey] was "over controlled" and "somewhat inh[i]bited emotionally." In Modlin's opinion, [Lackey] did not fit any particular category

such as psychotic, impulsive personality, or anti-social personality.

Modlin, however, classified [Lackey] as a "periodic drinker." Although [Lackey] did not have a daily need for alcohol, "[t]he problem [was] that he often drank too much and it got out of hand, and he would have alcoholic blackouts." Modlin testified that [Lackey's] version of the events on the morning of Kumph's murder was consistent with an alcoholic blackout at the time of the murder. Modlin testified that [Lackey] recognized his alcohol problems, and that [Lackey] would probably not constitute a continuing threat to society.

The State presented evidence to refute [Lackey's] mitigating evidence and his claim of alcoholic blackout. Carrol Johnson Holmes, [Lackey's] girlfriend and roommate at the time of the murder, testified that when [Lackey] saw the news coverage of Kumpf's murder, he turned to her and said, "Baby, I've got to tell you something. I'm the one they're looking for."

Lackey v. State, 819 S.W.2d at 113, 115, 129-30.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Lackey advances no special or important reason in this case, and none exist. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

CERTIORARI SHOULD BE DENIED AS AN INAPPROPRIATE ATTEMPT TO AVOID THE ABUSE OF THE WRIT DOCTRINE.

Lackey claims that the state has forfeited its right to execute him due to the length of time he has been challenging his execution and the fact that he has previously faced three execution dates. This claim was clearly available to him at the time he filed his federal habeas petition, as all of the circumstances of which he complains had already occurred. Lackey should not be allowed to now circumvent the federal abuse of the writ doctrine by litigating claims in a petition for writ of certiorari to the state court that could have been advanced previously.

As Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 111 S. Ct. 333 (1990), "this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." This policy is especially appropriate in a case such as this where review of a constitutional claim rejected by the state courts would allow a petitioner to bypass the proper application of the abuse doctrine in federal habeas review. Given the "[s]tate's strong interest in proceeding with its judgment" in this case and Lackey's obvious attempt to manipulate the system by seeking certiorari review of a claim previously available to him when he filed his petition for federal habeas corpus, a stay is not justified. *See Gomez et al., v. United States District Court*, 112 U.S. 1652, 1653 (1992).

By seeking certiorari review of the state habeas decision, Lackey clearly seeks to bypass federal habeas review and the proper dismissal of his successive claim in that forum as an abuse of the writ pursuant to Rule 9(b), 28 U.S.C. fol. §

2254. Lackey should not be allowed to avoid the proper application of the abuse doctrine.

Rule 9(b), 28 U.S.C. fol. § 2254, provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new or different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This provision applies with equal force to capital murder petitioners under sentence of death. *See McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992). In fact, this Court has explicitly stressed its applicability.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been brought years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist, and O'Connor, JJ., concurring).

Lackey's attempt to litigate these successive claims would be foreclosed in federal habeas review. A federal habeas court may address the merits of a successive claim only if the prisoner supplements his constitutional challenge with a showing of actual innocence. *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986). Although Lackey claims that his claim would fall under the "fundamental miscarriage of justice" exception to the abuse of the writ doctrine, he does not claim, much less demonstrate, that he is actually innocent of the crime or the death penalty in the sense that "but for a constitutional error no reasonable juror would

have found him eligible for the death penalty." *Sawyer v. Whitley*, 112 S.Ct. at 2517. Thus, Lackey's claim does not come under the "narrow scope of the fundamental miscarriage of justice exception." *Id.* at 2519. *See also Dugger v. Adams*, 489 U.S. 401 (1989); *Smith v. Murray*, 477 U.S. 527 (1986). Lackey, therefore, cannot establish the prerequisite to his right to litigate these claims in a successive habeas petition. *See Schlup v. Delo*, 1995 WL 20524 (U.S.Mo.).

This Court should decline to exercise its certiorari jurisdiction where, as here, a defendant asks the Court to review the denial in state habeas review of a claim that would be foreclosed from federal habeas review by the abuse of the writ doctrine. Allowing a petitioner to deliberately bypass the proper application of the abuse doctrine in the manner attempted by Lackey would eviscerate the effectiveness of the abuse doctrine in preventing piecemeal litigation.

III.

LACKEY'S CLAIM WAS PROPERLY DENIED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; IN THE ALTERNATIVE, HIS EXECUTION DOES NOT VIOLATE THE EIGHTH AMENDMENT.

Lackey claims that the state has forfeited its right to execute him due to the length of time he has been challenging his execution and the fact that he has previously faced three execution dates. He claims that to carry out his sentence at this time would violate the Cruel and Unusual Clause of the Eighth Amendment. This claim is without merit.

A. This Court is without jurisdiction to review the state court's determination that Lackey's claim was not cognizable in a petition for postconviction writ of habeas corpus.

The Court of Criminal Appeals denied Lackey's claim because it is "not cognizable in a petition to determine the legality of his sentence or confinement" pursuant to the Texas habeas statute. *See* Trial Court's Findings of Fact and Conclusions of Law at 10. Consequently, this Court lacks jurisdiction to review the state court's determination that Lackey's claim that his execution is rendered unconstitutional due to the length of time between the assessment and imposition of sentence.

A state conviction and sentence are presumptively valid and final at the conclusion of the direct appeal process, which includes the right to petition this Court for a writ of certiorari if a federal question is involved. *Murrary v. Giarratano*, 492 U.S. 1, 9 (1989). By contrast, state habeas proceedings are not part of the criminal process nor required by the Constitution.

> A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Id. at 13 (O'Connor, J., concurring), *citing Pennsylvania v. Finley*, 481 U.S. 551 (1987). Thus, if the state courts are not constitutionally required to provide habeas corpus review, *a fortiori* the state courts are not constitutionally required to recognize particular types of claims.

Because the Texas courts have chosen to not recognize as a basis for habeas relief the type of claim Lackey raised there, this Court is without jurisdiction. The

cases are legion that the Court is without jurisdiction to review a question of federal law where the decision of the state court rests on a state law ground adequate and independent of the federal question. *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *McCoy v. Shaw*, 277 U.S. 302 (1928); *Petrie v. Nampa Irrigation Dist.*, 248 U.S. 154, 157 (1918). "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 111 S.Ct. at 2554, *citing Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). As the decision of the state court rests on adequate and independent state law grounds, this Court is without jurisdiction to review the claim.

B. In the alternative, the state court's decision was proper because Lackey's claim does not constitute cruel and unusual punishment.

The Court has interpreted the Cruel and Unusual Clause of the Eighth Amendment to prohibit "those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). In addition, the Court has interpreted the cruel and unusual clause to prohibit punishment that offends the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). In determining what standards have "evolved" the Court has looked to the standards of "modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).[3]

[3] This refers to *American* standards, not the standards of other countries. *Stanford v. Kentucky*, 492 U.S. at 369 n.1 (emphasis in original). Therefore, Lackey's substantial reliance on *Pratt & Morgan v. The Attorney General of Jamaica*, Privy Council Appeal No. 10 of 1993 (Nov. 2, 1993), as the guiding

See also Harmelin v. Michigan, 111 S.Ct. 2680, 2691-92 (1991). To this end, the Court looks toward "objective indicia that reflect the public attitude toward a given sanction", the "statutes passed by society's elected representatives." *Stanford v. Kentucky*, 492 U.S. at 370 (quotations and citations omitted). The "evolved standards" thus prohibits "particular forms or 'modes' of punishment--specifically, cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 111 S.Ct. at 2691. Lackey cannot demonstrate that his execution at this time would have been considered cruel and unusual at the time the Bill of Rights was adopted or that it would be a cruel method of punishment that is not regularly followed at this time.

Beginning with the latter standard first, Lackey cannot demonstrate that the delay occasioned while he pursues appeals and collateral relief is unusual by present standards. Due to the procedural safeguards in place, it is certainly not uncommon to take more than ten years to carry out a death sentence from the time of sentencing. *See, e.g., Sawyer v. Whitley*, 112 S.Ct. at 2517 (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *McClesky v. Zant*, 111 S.Ct. 1454 (1991) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Harris v. Pulley*, 493 U.S. 1051 (1990) (previous opinion of the Court, *Pulley v. Harris*, 465 U.S. 37 (1984), demonstrates death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (denying

standard of what constitutes cruel and unusual punishment is misplaced. Moreover, in *Pratt & Morgan*, in addition to being premised on a different constitution and legal system than in the United States, the court there fashioned a rule by which any execution that is to take place more than five years after the sentence is assessed is presumptively "'inhuman and degrading punishment or other treatment'" in violation of the constitution governing Jamaica. No reason is given for the arbitrary time period of five years; that is, no reason is given as to why an interval of four and one-half years would not be in violation of the constitution, but a delay of six or seven years would. Thus, for good reason, such arbitrary "constitutional" time limits in Jamaica are obviously not applicable under the United States Constitution.

claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for 16 years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence).

Moreover, most states with the death penalty provide for a mandatory appeal to the state's highest court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court."); *Pulley v. Harris*, 465 U.S. at 43 n.7 (Georgia statute *requiring* State Supreme Court to conduct proportionality review "much copied"). Substantial amounts of time spent in determining complex issues in important cases do not implicate constitutional guarantees. *Cf., Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (delay of eight years between arrest and sentencing did not violate defendant's constitutional right to a speedy trial where the delay resulted from the need to assure careful review of an unusually complex case). Thus, a delay of over ten years between sentencing and the execution of the sentence is not unusual by present standards, nor is it unusual that a conviction and death sentence are automatically appealed to the State's highest court.

In addition, the fact that Lackey has previously had to prepare for an execution does not itself rise to the level of cruel and unusual punishment. The Court addressed a similar issue in *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. 459, 464 (1947).

> Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. *Even the fact that petitioner has already been subjected to a current of electricity*

> *does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.* . . . We cannot agree that the hardship imposed upon petitioner rises to the level of hardship denounced as denial of due process because of cruelty.

Id. at 464 (emphasis added). The mere fact that Lackey was able to block a previously scheduled execution through legal channels certainly does not give rise to a claim that the scheduling of that execution constitutes cruel and unusual punishment.

In the present case, no execution date was set until after Lackey's second conviction was affirmed in April of 1992--that is, no execution date was set while his appeal was pending before the Texas Court of Criminal Appeals.[4] Therefore, Lackey has spent less than three years with a pending execution. Moreover, his first conviction and death sentence was reversed, resulting in a new trial at which Lackey was presumed innocent of the crime and not under any sentence. His current death sentence was not assessed until April of 1983. *See Richmond v. Lewis*, 948 F.2d at 1491 (relevant period for assessing eighth amendment claim based on delay in carrying out sentence is time when sentence for which petitioner is presently under was imposed). Finally, as acknowledged by Lackey, Petition at 3, his case has involved highly complex issues, which could account for the length of time the courts have taken to resolve the challenges to his conviction. *Cf.*,

[4] In Texas, the trial court could not set an execution date while Lackey's appeal was pending. Tex. Code Crim. Proc. Ann. art. 42.04 ("When a defendant is sentenced to death, no date shall be set for the execution of sentence until after the receipt by the clerk of the trial court of the mandate of affirmance of the court of criminal appeals."). After the Court of Criminal Appeals issued its mandate, the trial court could set an execution date, but it could not set the date within thirty days of its order. Tex. Code Crim. Proc. Ann. art. 43.14. In this case, the trial court took no action on Lackey's case for approximately five months after his conviction became final. Then, the trial court scheduled his execution for approximately three months in advance, which, of course, was modified twice at Lackey's request.

Harrison v. United States, 392 U.S. at 221 n.4. During this time--and, in fact, not until all other avenues of attack upon his conviction and sentence have ended and his execution was little more than one week away--Lackey never once complained about the slow pace of the resolution of his claims or even inquired as to the time being devoted to the task. On the contrary, Lackey, as is apparent from his manner of proceeding, was content with delaying the ultimate resolution of his case for as long as possible. *See* Statement of Case, *supra*.

After the Court of Criminal Appeals affirmed his conviction and the time had expired for him to file a petition for writ of certiorari, the trial court, in April 1992, scheduled his first execution date. Lackey, on three occasions, requested modifications of his execution so he could pursue collateral relief in state court. The first two requests were granted. Thus, the fact that he has previously faced three execution dates was of his own making. Moreover, only his attorneys can be faulted for waiting until the last minute to file requests for modifications or his habeas applications in order to obtain a last-minute stay.[5]

[5] Lackey seems to argue that he is *required* to file an application for habeas relief and that it is a requirement that he face imminent execution before he is allowed to do so. Of course, he is not required to file a habeas application, and the state is not required to wait until collateral relief is completed before it may go forward with the execution of a presumptively valid conviction and sentence. *See Murray v. Giarratano*, 492 U.S. 1 (1989). Additionally, there is no requirement that he wait until his execution is imminent, or that he even have an execution date, before filing a state or federal habeas application. Tex. Code Crim. Proc. Ann. art. 11.01 *et seq.* However, as is customary for capital litigants today, nothing is filed until an execution date becomes imminent in order to create an emergency which the inmate believes will entitle the inmate to a stay of execution. In this way, the inmate seeks to prolong the process as long as possible.

In fact, Lackey's last-minute litigation at this stage is another case in point. This claim is essentially identical to the issue raised by the same attorney (Brent Newton with the Texas Resource Center) representing Lackey in *Calvin Jerold Burdine v. Texas*, No. 94-7623 (*cert. denied* February 21, 1995). Despite all of the legal work (as well as all factual allegations) being completed approximately one month ago, Lackey has chosen to wait until there is little more than one week before his scheduled execution to initiate habeas proceedings in state court. Thus, even at the moment that he is complaining that the delay in carrying out his sentence entitles him to relief he is nonetheless engaged in a game of high-stakes brinksmanship in order to create yet another delay.

Lackey also cannot demonstrate that the delay occasioned by his pursuit of appeals and collateral relief would have been considered cruel and unusual punishment at the time the Bill of Rights was adopted. While Lackey may accurately claim that a death sentence would not have taken near the amount of time as it does presently for it to have been carried out, he in no manner demonstrates that the speed with which executions were carried out at the time the Bill of Rights was adopted was due to the concern over what was cruel and unusual to the condemned. *See Pratt & Morgan*, slip op. at 2 (discussing swiftness of carrying out executions in eighteenth- and nineteenth-century England, but not discussing reasons). Contrary to Lackey's assertions, the procedures to which Lackey has been subject, which has allowed him to attack his conviction on direct appeal (once successfully) and in collateral proceedings, exhausting every imaginable claim at the expense of the state,[6] are quiet generous by the standards employed at the time the Bill of Rights was adopted when counsel was not required to be appointed at the time of trial, much less on collateral review.

Finally, as recognized in *Richmond v. Lewis*, 948 F.2d at 1491-92, to allow death-sentenced inmates, who have the most complex issues on appeal and lawyers most skillful at dilatory tactics, to avoid a death sentence due to the delay thus created would itself be arbitrary and capricious and, therefore, unconstitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972). *Richmond v. Lewis* bears quoting in this respect.

[6] Of course, Lackey never faced imminent execution while he pursued his direct appeal and was granted generous allowances of time in which to assert collateral remedies, if he so chose, after his conviction was affirmed.

> It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates--less successful in their attempts to delay--would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last line of appeals fails on the merits.

Richmond v. Lewis, 948 F.2d at 1473. No reason exists to allow death sentenced inmates to benefit from the unsuccessful pursuit of appeals.

IV.

LACKEY HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

In deciding whether to grant a stay of execution, the Court is guided by the following standard:

> "'[T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.'"

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983), quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (quoting *Times-Picayune Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974)). Because it is clear that the court below correctly resolved the issues presented and that their resolution only

involved the application of well-established precedent to the facts of this case, the jurisdictional prerequisite for certiorari review is lacking.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari and stay of execution be denied.

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